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JULY 1990

PUBLIC REPERT NO. 21

SUSTUT-TAKLA FOREST LICENCES

Attached is the investigation report of The Ombudsman's Office regarding the complaint of the Village of Hazelton into the awarding of certain Forest Licences by the Ministry of Forests. It is being released as a public report at this time with the agreement of the Village of Hazelton.

Stephen Owen
Ombudsman

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File No.: 88 02617

June 22, 1990

Her Worship Alice Maitland
Mayor, Village of Hazelton
P.O. Box 40
Hazelton, B.C.
V0J 1Y0

Dear Mayor Maitland:

Some time ago you wrote the Ombudsman's Office with a complaint concerning the Ministry of Forests. The focus of your complaint was a decision to award Forest Licence A27823 to two Prince George companies. You specified seven areas of concern. I will address each of these in turn.

I Ministry of Forests failed to follow prescribed statutory procedure in assessment of applications as required by section 11(4) of the Forest Act.

Section 11(4) of the Forest Act (as it was before being amended on July 11, 1988) reads as follows:

> (4) The Chief Forester shall evaluate each application, including its potential for
> (a) creating or maintaining employment opportunities and other social benefits in the Province;
> (b) providing for the management and utilization of Crown timber;
> (c) furthering the development objectives of the Crown;
> (d) meeting objectives of the Crown in respect of environmental quality and the management of water fisheries and wildlife resources; and
> (e) contributing to Crown revenues.

This section enumerates many different factors which the Chief Forester must take into account when making his decision. However, the section does not specify the

weight to be given to the different criteria; nor is the Chief Forester precluded from taking other relevant factors into account.

The Ministry generally relies on the data supplied by the applicants in the areas beyond its expertise. However, that is not to say that all projections supplied by applicants are accepted at face value. As the appications are reviewed by the various branches within the Ministry, unrealistic projections are noted by staff. A table outlining the criteria in section 11(4) and filling in the data for each applicant was prepared by the Ministry to fulfill this statutory requirement.

Applications for FL A27823 were received from the following companies:

(1) Finlay Forest Products/B.C. Forest Products, 85,000 m^3/year.
(2) Westar Timber Ltd. (Hazelton), 400,000 m^3/year.
(3) Prince George Wood Preservers Ltd. and Rustad Bros. Ltd., 400,000 m^3/year.
(4) Groot Lumber Ltd., 400,000 m^3/year.
(5) Takla Track and Timber Ltd., 400,000 m^3/year.
(6) West Fraser Mills Ltd., 400,000 m^3/year.
(7) Hans Fischer, 20,000 m^3/year.

The applications were evaluated by several branches within the Ministry and also by two regional offices, as follows:

(1) Valuation Branch

This Branch conducted its own assessment of stumpage rates. Based on a single cutting permit near the Sustut and Skeena River junction, the estimates were as follows:

Appraised Destination	Main Road Costs $/$m^3$	Rail Haul Costs $/$m^3$	Estimated Sawlog Stumpage
Hazelton	5.60	N/A	2.65
Smithers (Groot)	5.65	N/A	1.60
Smithers (West Fraser)	4.55	N/A	2.70
Fort St. James	N/A	11.06	.95
Prince George	N/A	12.00	.25

The Branch favoured the Westar (Hazelton) and West Fraser proposals which it concluded were comparable.

(2) Engineering Branch

This Branch based its review of the applications on data contained in current reports which included all the proposed access routes because some applications lacked specific cost detail for construction and log haul. Haul Cost ($/m^3) for Hazelton ranged from $11.91-13.25 while those for Prince George ranged from $15.32-20.97.

When considering the impact of different access routes on other resources, the Branch commented that the existence of a railroad would not influence mineral development any more than the existence of an all-weather road. The Branch noted that the capital cost of $25 million supplied by Prince George Wood Preservers and Rustad Bros. (PGWP/RB) was low in comparison to another estimate of $44 million. The Branch concluded that the least expensive route to access the area originated in Hazelton and closely paralleled that proposed by Westar.

(3) Industrial Development and Marketing Branch

After reviewing all the applications, the Branch commented that a road from either Smithers or Hazelton would provide more efficient access than the railroad due to lower cost, higher stumpage and higher bonus bids. The Branch favoured the bid of Westar marginally over that of West Fraser.

(4) Prince Rupert Regional Office

After completing an extensive assessment of the applications, this regional office recommended that the licence be divided with 250,000 m^3 to West Fraser and 150,000 m^3 to Westar.

(5) Prince George Regional Office

It was the position of this office that, because the Chief Forester identified the restoration of rail service into the Sustut-North Takla by 1991 to be

an essential management strategy in his summary in the Prince George Timber Supply Area (TSA) Plan, applications which provided for access to the area by road from the west should be discounted. Of the two applications from Prince George companies, this regional office favoured that of PGWP/RB.

(6) Timber Policy Branch

After a detailed examination of each proposal and considering the other assessments done, this Branch recommended to the Deputy Chief Forester that the forest licence be divided between West Fraser (250,000 m^3) and Westar (150,000 m^3). On balance the applicants were considered comparable with respect to creating employment; commitment to forest management; meeting development objectives of the Crown; and providing for environmental protection and management of other resources. There was, however, a major difference in expected Crown revenues.

Annual stumpage revenues from West Fraser and Westar were expected to be greater than that of PGWP/RB or Takla Track and Timber (TTT) by approximately $1 million annually. In addition, bonus bids of West Fraser ($500,000) and Westar ($250,000) were much higher than TTT ($45,000), the only other applicant to include a bonus bid. In addition, due to lower operating costs and diversified markets, West Fraser and Westar were in a better position to deal with downturns in the market should they occur.

With respect to the upgrading of the Takla Extension, the Branch noted the very conservative cost estimate of PGWP/RB ($25 million) and that the likelihood of requests for direct or indirect government assistance was a real possibility.

The Branch recognized the significant negative social and economic impact on Prince George if the Forest Licence were awarded to the Smithers/Hazelton area but commented that without a detailed socio-economic impact analysis, it was impossible to quantify the implications with any degree of reliability.

It is our finding that the extensive reviews completed by these Branches and Regional Offices of the Ministry fulfilled the statutory requirements of section 11(4).

II The Ministry violated the criteria in section 4 of the Ministry of Forests Act.

Section 4 of that Act reads as follows:

> 4. The purposes and functions of the Ministry are, under the direction of the Minister, to
>
> (a) encourage maximum productivity of the forest and range resources in the Province;
>
> (b) manage, protect and conserve the forest and range resources of the Crown having regard to the immediate and long term economic and social benefits they may confer on the Province;
>
> (c) plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the Crown and with the private sector;
>
> (d) encourage a vigorous, efficient and world competitive timber processing industry within the Province; and
>
> (e) assert the financial interest of the Crown in its forest and range resources in a systematic and equitable manner.

You were not specific in your letter as to how this section had been violated. Again, the legislation provides no guidance with regard to balancing competing or conflicting interests. However, there is no evidence to suggest that the Ministry did not fulfill the statutory obligations imposed by this section.

III The Ministry of Forests, Cabinet, or the Premier may have usurped the statutory right of the Chief Forester to render a licence decision.

As mentioned earlier in this letter, section 11(4) of the Forest Act (as it was before being amended on July 11, 1988) required the Chief Forester to evaluate the applications for forest licences. Section 11(5) reads as follows:

> (5) The Chief Forester shall approve one or more applications for all or part of the advertised volume of timber or shall, at the direction of the Minister, decline to approve all applications.

Section 2(b) of the Ministry of Forests Act authorizes the appointment of a Chief Forester. In accordance with sections 22(4) and 23(2) of the Interpretation Act, the Deputy Minister of Forests appointed a Deputy Chief Forester on February 11, 1985. The Deputy Chief Forester routinely acts in place of the Chief Forester under section 11 of the Forest Act.

At the time this forest licence was awarded, the Forest Act entrusted the Chief Forester (or his delegate, the Deputy Chief Forester) with discretionary authority. The criteria which he was required to take into account when exercising his discretion are listed in section 11(4). He was not precluded from giving consideration to other relevant factors, e.g. pertinent policy or the advice of the Minister of Forests. While the recipient of a statutory grant of discretionary authority may take into account relevant policy, he must not so rigidly apply the policy that individuals are deprived of the benefit of the discretion by administratively created limitations that were not contained in the statute. With regard to seeking the advice of the Minister, the Deputy Chief Forester could consider such advice, but he was required personally and independently to exercise the discretion conferred upon him and not to act at the dictation of another person.

In accordance with the Ministry's policies, the applications for this forest licence were evaluated by technical experts in several different branches within the Ministry. These evaluations were based on the

criteria set out in section 11(4) of the Forest Act. After reviewing these evaluations, an Evaluation Report was forwarded to the Deputy Chief Forester by the Timber Policy Branch.

The internal evaluations for FL A27823 were overwhelmingly in favour of having the wood flow west. In a memo to the Minister, dated May 17, 1988, the Deputy Chief Forester first considered the broad issue of whether the wood should flow east or west. He outlined 3 basic options.

OPTION 1. 400,000 m^3 west to Smithers/Hazelton area.

OPTION 2. 400,000 m^3 east to Prince George mills.

OPTION 3. 200,000 m^3 west and 200,000 m^3 east.

On this broad issue, his recommendations were that the entire 400,000 m^3 should flow west, and that if the Prince George operators did not take positive initiatives to harvest the 900,000 m^3 replaceable AAC in the Sustut-North Takla area, the boundary of the Prince George TSA be changed to exclude that portion of the Sustut-North Takla area which is more logically tributary to the TSAs of the west and that the AAC of the Prince George TSA be adjusted downward accordingly.

With respect to the award of the forest licence, the Deputy Chief Forester concluded that 250,000 m^3 be offered to West Fraser and 150,000 m^3 to Westar on the condition that it continue to operate both its Hazelton and Kitwanga mills for a predetermined period. His final comment was that if it were the government's underlying intention to see a functioning industrial railroad in the Fort St. James/Dease Lake corridor, Option 3 (see above) would be the most appropriate.

After receiving the Deputy Minister's recommendation, the Minister of Forests made a presentation to Cabinet outlining the various award options; however, no recommendation was made at that time. The Director of the Timber Harvesting Branch also attended this Cabinet meeting. After the Minister's presentation, the Director excused himself from the room. At the conclusion of the

Cabinet meeting, the Minister informed the Director that Cabinet had concluded that the forest licence should be awarded to PGWP/RB and TTT. The Director passed this information on to the Deputy Chief Forester, who stated that he then had no realistic option but to award the licence to these Prince George companies.

The forest licence was offered to PGWP/RB (200,000 m^3) and TTT (200,000 m^3) subject to two conditions: (1) that logging begin no later than January 1, 1991 and (2) that the timber be appraised to Fort St. James.

There is a presumption that the naming by the Legislature of a specific person to exercise some discretion indicates that the person was deliberately selected because of some aptitude peculiar to himself. It is section 2(b) of the Ministry of Forests Act which authorizes the appointment of a Chief Forester. Section 11(4) of the Forest Act requires the Chief Forester to evaluate applications for a forest licence. Five factors to be taken into account in his evaluation are enumerated. Section 11(5) states that the Chief Forester shall approve one or more applications, or, at the direction of the Minister, decline to approve all applications.

The Courts routinely review the exercise of discretion by public authorities to ensure that the discretion has been properly exercised. An exercise of discretion may be found to be ultra vires if there has been an abuse of discretionary power (irrelevant considerations taken into account, refusal to consider relevant factors, the exercise of discretion in bad faith or for an improper purpose) or a failure to exercise the discretionary power (inflexible application of a rule or acting under the dictation of another).

Statutory discretion demands the exercise of independent judgment. The individual entrusted by the Legislature with discretion must exercise it himself. There must be a genuine, as opposed to a purported, exercise of his discretionary power by the decision maker. He cannot abdicate his statutory responsibility by acting upon directions given him by the Minister or Cabinet.

The position of the Deputy Chief Forester is not an easy one. In addition to holding this position, he is also an Assistant Deputy Minister. His relationship to the Minister in his role as Deputy Chief Forester (where he must independently reach and act on his own decision) differs fundamentally from his relationship to the Minister in his role as Assistant Deputy Minister. In his latter role, he may be limited to offering advice to the Minister; but, in his former role, it is the Minister who is limited to offering advice to the Deputy Chief Forester.

It was the conclusion of the Ombudsman's Office that in the award of this forest licence, it appeared that the Deputy Chief Forester acted upon the dictation of the Minister, a person not charged with the exercise of the discretion and without the statutory authority to direct the Deputy Chief Forester concerning the award of the licence.

On July 11, 1988, section 11 of the Forest Act was amended to give the Minister (or a person authorized by him) the discretionary authority previously entrusted to the Chief Forester. The Ombudsman's Office suggested that the Minister of Forests reconsider the applications, evaluations, and recommendations received, and reissue the forest licence as he considered approriate pursuant to the statutory requirements of section 11(4) of the Forest Act.

On April 2, 1990, the Minister wrote this office that he had reviewed the procedure and the award of FL A27823. After doing this review, he reached the conclusion that the decision should not be changed and so he confirmed the award to PGWP/RB and TTT. As a result, the Ombudsman's Office considered this issue resolved.

IV There were irregularities in the way the licence decision was announced.

You wrote that at the moment officials in the Minister's office were denying a Sustut-Takla allocation decision has been made, the press was reading a release with detailed award information.

No investigation into the circumstances around the annoucement of licence award was undertaken. There are no statutory requirements concerning the announcement of licence awards. If your account is correct, it might indicate a lack of coordination between the Minister's office and the Public Affairs Branch.

V The award of half the allowed licence harvest to each of two companies causes a number of serious concerns.

You wrote that all the applications for FL A27823 were based on company promises made possible by the receipt of the full 400,000 m^3/year available from the Sustut-Takla block.

Two applications (those of Finlay Forest Products/B.C. Forest Products and Hans Fischer) were for less than 400,000 m^3/year. West Fraser Mills Ltd. was for either 400,000 m^3/year or 250,000 m^3/year.

The Ministry's decision announced on May 26, 1988 was to offer a forest licence of 200,000 m^3/year to both PGWP/RB and TTT. After this announcement, the successful applicants must enter into negotiation with the Ministry concerning the exact terms of the forest licence. The process is exactly the same whether there is one or more successful applicants. The statutory requirements concerning the content of a forest licence are set out in section 12 of the Forest Act.

VI The Minister of Forests justified the allocation decision because the tenure area was located in the Prince George Forest Region, but in fact the Sustut-Takla block is located in the Prince Rupert Forest Region.

For administrative purposes, the Ministry has divided the Province into forest regions which are then subdivided into forest districts. The designation Timber Supply Area (TSA) flows from section 6(b) of the Forests Act which authorizes the Minister to designate as a timber supply area one or more public sustained yield units, tree farm licence areas, areas of other Crown land or private land. Section 6(c) allows the Minister to order the consolidation, division, or abolition of TSA's or the amendment of their boundaries.

The Sustut-Takla blocks have been included in the Prince George TSA since approximately 1980. These blocks are administered by the Fort St. James District office.

VII The decision to award the Sustut-Takla blocks to Prince George companies was made in advance of the official licence award.

You referred to documents such as the Prince George Timber Supply Area Plan and the agreement between PGWP/RB and British Columbia Railway (BCR) to support your allegation.

The Ministry of Forests' Prince George Timber Supply Area Plan for the 5-year period January 1, 1986-December 31, 1990 is the major mechanism for coordinating and integrating forest, range, and recreation resource management practices among the districts within the TSA. The Sustut-Takla supply blocks were required to support the Allowable Annual Cut (AAC) of 9,100,000 m^3/year. The timber harvesting strategy outlined in the TSA Plan assumed full restoration of the BCR by January 1, 1991. If the BCR Dease Lake extension were not restored by 1991, then the AAC of the TSA would have to be reduced by 900,000 m^3/year because the remaining land base would not be able to support the AAC. The minimum volume required to make the Dease Lake extension viable is considered to be 1,300,000 m^3/year.

While it is evident that the Prince George community was hoping to obtain the Sustut-Takla volume, there is no evidence to suggest that a final decision was made far in advance of the official licence award. It would be only prudent for an applicant whose application was premised on the operation of rail service to enter into a preliminary agreement with BCR. However, such an agreement would in no way involve the Ministry.

At this point we will be closing your file. I understand from Mr. Aberly that you have additional concerns about the licensee's adherence to certain terms of the licence. If you would like the Ombudsman's Office to look into these concerns, please outline them in a letter.

Yours sincerely,

Barbara Humphreys
Ombudsman Officer